

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

JOEY MOSES,
Defendant/Petitioner.

NO. CR-06-0071-EFS
(NO. CV-10-0079-EFS)

**ORDER DENYING MOTION TO VACATE
JUDGMENT AND SENTENCE UNDER 28
U.S.C. § 2255**

Before the Court, without oral argument, is Petitioner Joey Moses' Motion to Vacate Judgment and Sentence Pursuant to 28 U.S.C. § 2255 (Ct. Rec. [127](#)). Mr. Moses contends he was denied effective assistance of counsel during sentencing because defense counsel failed to present testimony relating to Mr. Moses' mental health issues and difficulties he experienced while living on the Indian reservation.

A. Background

On May 2, 2007, Mr. Moses pled guilty to Murder in the First Degree in violation of 18 U.S.C. §§ 1111(a) and 1153(a) and Use of a Firearm in Furtherance of a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A). (Ct. Rec. [71](#).) At the April 1, 2008 sentencing hearing, the Court granted the Executive Branch's substantial assistance motion and departed downward from first-degree murder's mandatory life sentence.

1 After considering the relevant factors set forth in 18 U.S.C. § 3553(a),
2 the Court sentenced Mr. Moses to twenty-five years imprisonment on the
3 first-degree murder conviction, along with a mandatorily-consecutive ten-
4 year sentence on the firearm conviction, for a total term of imprisonment
5 of thirty-five years. (Ct. Rec. [113](#).) Mr. Moses' direct appeal was
6 denied. (Ct. Recs. [125](#) & [126](#).)

7 **B. Review Standard**

8 Pursuant to Rule 4(b) of the Rules Governing Section 2255
9 Proceedings for the United States District Courts, the Court must examine
10 a § 2255 motion and the record to determine whether summary dismissal is
11 warranted. Rule 4(b), 28 U.S.C. foll. § 2255. "If it plainly appears
12 from the face of the motion and any annexed exhibits and the prior
13 proceedings in the case that the movant is not entitled to relief in the
14 district court, the judge shall make an order for its summary dismissal."
15 *Id.*; see also *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir.
16 1982).

17 **C. Analysis**

18 Viewing the record under this standard, the Court denies Mr. Moses
19 habeas relief. The right to effective assistance of counsel in criminal
20 proceedings is bestowed by the Sixth Amendment. This right is violated
21 when 1) counsel's performance fell below an objective standard of
22 reasonableness and 2) the criminal defendant was prejudiced by such
23 deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This
24 is a high standard for the criminal defendant as a court is to be highly
25 deferential to counsel's chosen performance. *Strickland*, 466 U.S. at
26 689; *United States v. Mejia-Mesa*, 153 F.3d 925, 931 (9th Cir. 1998).

1 Counsel's decisions are "examined according to what was known and
2 reasonable at the time the attorney made his choices." *Hendricks v.*
3 *Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995). A criminal defendant is
4 prejudiced if there was a "reasonable probability that, but for counsel's
5 unprofessional errors, the result of the proceeding would have been
6 different." *Strickland*, 466 U.S. at 694.

7 Mr. Moses contends that defense counsel's failure to call 1) an
8 expert to testify regarding Mr. Moses' mental health issues and 2) Mr.
9 Moses' girlfriend constituted prejudicial ineffective assistance of
10 counsel. Because defense counsel provided the Court with a written
11 report prepared by Dennis R. Pollack, Ph.D., a mental health expert, who
12 was hired by previously-appointed defense counsel, the Court was aware
13 of Mr. Moses' mental health issues related to neglect as a child,
14 physical abuse on the reservation, and drug and alcohol abuse. The Court
15 discussed Dr. Pollack's mental health evaluation with defense counsel
16 during the sentencing hearing, and defense counsel argued that the Court
17 should take Mr. Moses' mental health issues and the difficult life that
18 he experienced on the reservation into account when fashioning a
19 sentence. In addition, both Defendant's Sentencing Memorandum and the
20 Presentence Investigation Report discussed Mr. Moses' mental health
21 issues and the difficult life that he experienced on the reservation as
22 a result of parental neglect and the physical abuse he suffered from
23 other individuals. Also, because defense counsel was present during Mr.
24 Moses' testimony at the trial of Norman Ford, defense counsel was aware
25 that the Court had heard Mr. Moses' testimony relating to his difficult
26 life on the reservation. Given the quantity and nature of the

1 information and argument to the Court relating to Mr. Moses' mental
2 status, upbringing, and abuse suffered, the Court finds that defense
3 counsel's decision to not call Dr. Pollack or Mr. Moses' girlfriend at
4 the sentencing hearing was reasonable and does not constitute ineffective
5 assistance.

6 Further, Mr. Moses cannot show prejudice arising from defense
7 counsel's decision to not call these individuals as witnesses at the
8 sentencing hearing because the Court did take Mr. Moses' mental health
9 issues and difficult life into account when fashioning the sentence under
10 18 U.S.C. § 3553(a). During its recitation of its sentencing rationale,
11 the Court stated that it

12 sees Mr. Moses as a victim both by his parents and neglect of
13 the tribe for his issues as well as the alcoholism that was
14 front and center throughout the entire trial at Mr. Ford's
15 house - Mr. Ford's trial when witness after witness testified
to the kind of abuse of alcohol that took place that night as
well as in the days before that as far as Mr. Moses was
concerned.

16 (Ct. Rec. 122 p. 45.) The Court also stated, "[t]he history and
17 characteristics of Mr. Moses have already been discussed. And those are
18 the *mitigating* factors along with the grant of the motion for downward
19 departure under 5K1.1 that the Court has considered. So the Court grants
20 the motion, and that lifts the mandatory requirement of life
21 imprisonment." *Id.* pp. 46-47 (emphasis added). Further, the Court
22 commented, "Mr. Moses has no vocational skills and may be psychologically
23 impaired as a result of a childhood of neglect and abandonment of his
24 parents that are shameful." *Id.* at 48. Mr. Moses failed to show that
25 "there is a reasonable probability that, but for counsel's unprofessional
26

1 errors, the result of the proceeding would have been different."
2 *Strickland*, 466 U.S. at 694.

3 In summary, it plainly appears from the face of the motion,
4 supporting documents, and prior proceeding that Mr. Moses is not entitled
5 to the requested habeas relief. For the above-given reasons, **IT IS**
6 **HEREBY ORDERED:**

7 1. Petitioner's Motion to Vacate Judgment and Sentence Pursuant
8 to 28 U.S.C. § 2255 (**Ct. Rec. [127](#)**) is **DENIED**.

9 2. The Court **DECLINES** to issue a certificate of appealability.

10 3. The related civil case file is to be **CLOSED**.

11 **IT IS SO ORDERED.** The District Court Executive is directed to enter
12 this Order and provide a copy of this Order to counsel.

13 **DATED** this 20th day of May 2010.

14
15 S/ Edward F. Shea
16 EDWARD F. SHEA
United States District Judge

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